good, supra, which, as I have said earlier, were unsustainable in view of the difference in our system of conveyancing. Be that as it may, the learned trial judge seems firmly satisfied that the 14 days mentioned in the vendor's notice were unreasonably short He said this:

"I do not intend to specify what would be a reasonable time for the completion of all these steps but I certainly do not think that two weeks was reasonable. Indeed the plaintiff had asked for one month to complete the purchase as he thought that the period of two weeks within which to complete the purchase was not sufficient. I hold therefore that the notice was not valid and that the mere fact that the purchase was not completed on 28/5/1965 is not a bar to the plaintiff's right to relief. I will therefore allow the plaintiff's claim with costs."

His satisfaction seems to have been based upon a consideration of the evidence before him as a whole and, in particular, upon the evidence of the purchaser that he could not complete the purchase within 14 days. The test applied there was clearly that of a reasonable man. Even on the ground stated by the learned trial judge, this appeal will also fail.

Finally, I would add this. In terms of the agreement there cannot be any forfeiture of the deposit under clause 5 unless the purchaser has committed a breach of the contract. The uncontradicted evidence on record could only point to the fact that never at any time had the purchaser indicated, by words or deed, that he was unwilling to keep his part of the bargain. It might well be that he was unable to raise the balance of the purchase price within the period given in the vendor's notice. Twenty three thousand odd dollars is not such a sum of money which many people can raise within such a period. There was, therefore, nothing unusual, or unreasonable in the purchaser's request for an extension of time. All that he asked for was two weeks extension. But unfortunately this request did not come to the notice of the vendor. That, in my view, is immaterial. If the purchaser's evidence of his request for an extension of time could be accepted as true, and I can see no reason why it should not, it would clearly establish that he was at all times ready and willing to complete the purchase. There was, therefore, no breach of contract as might warrant a forfeiture under clause 5 of the agreement.

Upon any view of this matter, the appeal must fail.

Azmi L.P. and **Gill F.J.** concurred.

Appeal dismissed.

Solicitors: *Shearn, Delamore & Co.; S. Seenivasagam & Sons.*

AIKBEE SAWMILL LTD. v. MUN KUM CHOW

[F.C. (Azmi L.P., Gill and Ali F.JJ.) October 12, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. 60 of 1970]

Negligence — Injuries sustained in course of employment — Failure of employer to provide reasonably safe system of work — Failure to take reasonable steps to give adequate directions — Contributory negligence.

The plaintiff/respondent had claimed damages for personal injuries caused to him in the course of his employment with the appellants. The respondent and another workman were engaged in loading planks on a lorry of the defendants. The workers did not use cross-bars in loading the planks and had not been instructed to do so. Some of the planks which had been stacked on the lorry toppled over and struck the plaintiff. It was alleged that the accident was caused by the negligence of the appellants, their servants or agents and/or breach of the appellant's duty to provide a safe system of work. The learned trial judge held that there was evidence that the work was one where dangers were necessarily inherent in its operation and that therefore there was a duty on the part of the defendants/appellants to provide a reasonably safe system so as to protect the workmen from unnecessary risk and to give adequate instructions. He therefore gave judgment for the respondent. The defendants appealed and the only ground of appeal was that there was no finding of contributory negligence on the part of plaintiff/respondent. It was alleged that the respondent was aware of the purpose of using cross-bars in loading the planks and of the consequential danger of not using them and he was therefore negligent in not using them.

Held, dismissing the appeal: the evidence in this case showed that no instructions had been given to the workers that they must use cross-bars but rather that they were left to their own devices to load the planks. In the circumstances the respondent could not be said to be negligent in not using the cross-bars and therefore the learned trial judge was right in giving judgment for the respondent.

Cases referred to:-

(1) *Bonnington Castings Ltd.* v. *Wardlaw* [1955] 1 All E.R. 615; [1956] A.C. 613.

(2) *Speed* v. *Thomas Swift Company Ltd.* [1943] K.B. 557, 563.

(3) *Colfar* v. *Coggins & Griffith (Liverpool) Ltd.* [1945] A.C. 197, 202.

(4) *Winter* v. *Cardiff Rural District Council* [1950] 1 All E.R. 819.

(5) *General Cleaning Contractors Ltd.* v. *Christmas* [1953] A.C. 180 at p. 195.

(6) *Morris* v. *W. Hartlepool Navigation Co. Ltd.* [1956] 1 All E.R. 385 at p. 387.

(7) *Paris* v. *Stepney Borough Council* [1951] 1 All E.R. 49.

(8) *Cavanagh* v. *Ulster Weaving Co.* [1960] A.C. 145.

(9) *Graham* v. *Co-operative Wholesale Society Ltd.* [1957] 1 All E.R. 654 at p. 656.

(10) *Morton* v. *William Dixon Ltd.* [1909] S.C. 807, 809.

(11) *Walker* v. *Bowaters Mersey Paper Mills Ltd.* [1952] 2 Ll. Rep. 299 at p. 301.

(12) *Stapley* v. *Gypsum Mines Ltd.* [1953] A.C. 663.

(13) *Kelly* v. *Manchester Ship Canal Company* [1966] 1 Ll. Rep. 254.

(14) *Martin* v. *A.B. Dalzell & Co. Ltd.* [1956] 1 Ll. Rep. 94.

(15) *Tan Choon Seng* v. *Yang Kam Hah* [1970] 1 M.L.J. 175.

(16) *Hamid bin Awang* v. *Yeo Kim Kuan* [1966] 1 M.L.J. 124.

(17) *Barkway* v. *South Wales Transport* [1950] 1 All E.R. 392 at p. 402.

FEDERAL COURT.

N. A. Majoribanks for the appellant.

H. E. Cashin for the respondent.

Cur. Adv. Vult.

In the court below *Mr. Denis Murphy* appeared for the plaintiff and *Mr. N. A. Marjoribanks* for the defendants. On May 5, 1970 the learned trial judge delivered judgment as follows:

Abdul Hamid J.: The plaintiff, a lorry driver, is claiming damages for personal injuries caused to him in the course of his employment with the defendants. He is alleging that it was part of his duty as such employee, to load sawn timber (planks) on a lorry of the defendants.

The accident happened on or about the 26th day of December, 1964 while the plaintiff, together with one Ong Kim Seng (PW 3), was engaged in loading the planks. Some of the planks which had been stacked toppled over and struck the plaintiff.

It is alleged that the accident was caused by the negligence of the defendants, their servants or agents and/or breach of the defendants' duty, as employers of the plaintiff, to provide a safe system of work. Particulars of negligence and breach of the defendants' duty as set out in the statement of claim are as follows —

(a) causing or permitting the plaintiff to stack the timber on the lorry in the manner which the defendants knew or ought to have known, exposed the plaintiff to risk of injury;

(b) failing to provide and/or failing to instruct the plaintiff and/or his said co-employee to use cross pieces or other means to prevent stacked timber from toppling and injuring the plaintiff.

(c) failing to provide and/or to instruct the plaintiff and/or his said co-employee to use a system of loading the timber which would preclude the risk of timber toppling and injuring the plaintiff.

The defendants deny that the said accident was caused by the alleged or any negligence. They contend that the accident was one of the ordinary risks of loading sawn timber and there was no obligation on their part to provide a system of work in connection with the loading. Alternatively the defendants contend that, if they were under any such obligation, they have taken all reasonable steps to provide a system that was reasonably safe having regard to the dangers necessarily inherent in the work.

Briefly the facts are that — The accident happened in the compound of the defendants' sawmill. The labourers of the sawmill carried the planks to the lorry and passed them to the plaintiff and PW 3, another employee of the defendants, who stood on each end of the trailer. The planks were passed from one side of the trailer and were then stacked on the other side in two rows until they come up to a height of about three feet. They then stacked another two rows of planks to a height of about one foot, and using this as a platform, they completed the stacking of the earlier piles to a height of about six feet. The process was repeated until the trailer was stacked with planks to a height of about six feet. While the plaintiff was on the ground, the last pile of planks six feet high toppled and fell on the plaintiff.

The plaintiff was in the employment of the defendants for almost two years up to the date of the accident. He said that neither the proprietor, one Tan Boon Pin, who employed him nor the manager one Tan Yean Siew, instructed or taught him how to load the planks. No cross pieces were used when he did the loading on the day in question. It was only when narrow pieces of planks were being loaded that cross pieces were used to prevent the planks from falling.

PW 3 also said that he was never trained on how to load the planks. He observed the method of loading from other labourers employed by the same company.

On the question of proof, Mr. Majoribanks submitted that the burden is on the plaintiff. He referred to 25 *Halsbury's* third edition, p. 510 where it is stated that —

"In order to succeed in an action for damages against his master, a workman must show that his injuries were caused by the master's breach of duty, the onus being upon him to establish both the breach of duty and the fact that the breach was the cause of his injuries."

He also referred to *Bonnington Castings, Ltd.* v. *Wardlaw*[1] where it was held that —

"In an action for damages for negligence at common law, the onus of proving that the fault complained of caused, or materially contributed to, the injury complained of, as well as of proving the negligence or breach of duty, lies on the plaintiff."

He drew the court's attention that though the injury has been proved, neither the existence of negligence nor the defect of the system is proved.

There can be no dispute that the burden of proof lies with the plaintiff. However it is clear from the evidence that the plaintiff was injured while he was loading planks on to a trailer belonging to the defendants. The question for the court to consider is whether the operation was one which required a system of work. If it was, what was the duty on the part of the defendants at common law? Was there a breach of that duty? If there was, whether the defendants have taken reasonable steps to provide a reasonably safe system of work having regard to the dangers necessarily inherent in the work.

It is perhaps convenient at this stage, to consider what at common law is the extent of employers towards an employee with regard to the safe system of work

At common law, a duty is imposed on a master

"to take fitting care to see that the servants, jointly engaged with him in carrying out his work or industry, shall not suffer injury either in consequence of his personal negligence, or through his failure properly to superintend and control the undertaking in which he and they are mutually engaged." [25 *Halsbury's* third edition, p. 505].

and,

"A master is under a duty, arising out of the relationship of master and servant, to take reasonable care for the safety

of his work-people in all the circumstances of the case so as not to expose them to an unnecessary risk." [*Halsbury's* third edition pp. 508/9].

One of the master's obligation is the provision and maintenance of a reasonably safe system of working —

"If, therefore, a servant is injured because the system is defective, the master is liable, even if there was no negligence in the carrying out of the system which had been devised." [25 *Halsbury's* third edition, p. 512].

What is meant by "system of work"? *Charlesworth* on Neligence four edition para. 857 states —

"A system of work is the term used to describe the way in which it is intended the work shall be carried out, the sequence of events, the parts to be taken by the various men employed and the time at which they shall do their various parts. 'It includes ... or may include according to circumstances such matters as the physical layout of the job — the setting of the stage, so to speak — the sequence in which the work is to be carried out, the provision in proper cases of warnings and notices, and the issue of special instructions. A system may be adequate for the whole course of the job or it may have to be modified or improved to meet circumstances which arise. Such modifications or improvements appear to me equally to fall under the head of system.'"

[*Speed* v. *Thomas Swift Company, Limited*[2]; see also *Colfar* v. *Coggins & Griffith (Liverpool), Limited*[3]] Lord Reid in *Winter* v. *Cardiff Rural District Council*[4] said —

"A system of working normally implies that the work consists of a series of similar or somewhat similar operations...."

In *Charlesworth* on Negligence at para. 859 the learned author said that —

"A system of work must therefore be provided when the work is of a regular and uniform kind, such as in a mine, a factory or on a railway and it is necessary in the interests of safety, or when the danger is one which is constantly found so as to call for a system to meet it."

It is established that the duty to prescribe a safe system is not an absolute duty. "It is a duty to take reasonable steps to provide a system which will be reasonably safe, having regard to the dangers necessarily inherent in the operation."

Whether this operation was one which required a system of work, I think, is a question of fact, and the whole operation will have to be viewed in the light of prevailing circumstances. It is not known exactly what were the nature and type of the vehicles used previously to transport planks of this kind. Generally, however, smaller lorries with limited capacities were used, and the loading operation was invariably simpler and the planks need not have to be stacked to such a considerable height. Today it is common knowledge that a trailer with a capacity of five to ten tons is used and the planks are stacked even to a height of six feet, higher than an average man's height. The stacking operation thus has to be properly organized to ensure safety. The risks of these planks toppling over is apparent if they are not properly stacked. There is therefore a need for a method of loading to be devised to avoid unnecessary risk. It may be argued that in respect of the defendant company, there has never been any accident. True, but this fact does not, to my mind, necessarily indicate that the danger is not inherent in such operation.

In the instant case, the plaintiff adduced evidence from one Abdul Kadir Merican (PW 2) as to the proper method of loading. He claimed that he had experience in loading planks into lorries. He described what to him was the proper method of loading planks on to a trailer similar to the one shown in P1. To prevent from falling, small sawn timber 3" x 1" x width of the trailer ought to be placed on the planks across the trailer after the planks are stacked thereon to about one foot high. This should be repeated until all the planks are loaded. He further stated that if the planks are loaded without cross pieces, it will be difficult to tighten them up. They might slip and the other half already loaded, may topple.

The defendants argued that it is common practice to place cross pieces and it is customary for the employers to give directions. Evidence that the system used is common practice in a trade or industry must be given proper and careful consideration but it is not conclusive evidence that it is reasonably safe.

Charlesworth on Negligence fourth edition, para. 859, dealing with this question states —

"...In deciding what is reasonable, long established practice in the trade, although not necessarily conclusive, is generally regarded as strong evidence in support of reasonableness." [*General Cleaning Contractors Limited* v. *Christmas*[5]].

While it is perfectly proper for the defendants to rely on common practice, the court must however be satisfied that there is sufficient evidence on the balance of probabilities, to establish that it is reasonably safe.

The defendants have adduced evidence to show that it was the practice to use cross pieces. On the facts before me, I am not satisfied that there is conclusive and strong evidence for an absolute determination on this point. Though DW 1 and DW 2 gave evidence that cross pieces were used, it seems to me that it is equally clear from the evidence of PW 3 and the plaintiff, that the method employed was that practised by people concerned in similar operations. According to them, it was not the practice to use cross pieces every time planks were loaded. On the balance of probabilities, it is reasonable to conclude that the common practice was to leave entirely to the workmen to exercise their own discretion whether in any particular loading cross pieces ought to be used. That being so, it can hardly be said that there is conclusive evidence upon which the court can hold that it was the common practice to use cross pieces. [See *Morris* v. *W. Hartlepool Steam Navigation Co., Ltd.*[6], *Paris* v. *Stepney Borough Council*[7] and *Cavanagh* v. *Ulster Weaving Co.*[8]].

Furthermore it is also doubted that there is con clusive evidence that it is reasonably safe in the light of modern type of conveyances used. Sawmilling in this country has become a major industry, and it is common knowledge that, apart from modern and up-to-date equipment and machinery used in the production of sawn timber, modern and up-to-date conveyances are used to transport them. Equipped with these types of conveyances capable of carrying very heavy load, it is, I think, futile for the employers to continue to rely on common practice. Using a trailer of the kind shown in the photograph, a loading

operation requires, to ensure safety, a proper system of work. Matters such as the method by which the loading operation should be employed, the height and quantity of the load, the provision of materials to be used, namely, the cross pieces, the platform for loading and the chain for securing the load, are some of those things which an employer in this kind of business ought to take reasonable steps to provide. Apart from this, reasonable steps should be taken to see that adequate directions be given as regards the manner in which the operation should be carried out. In the present case, I am not satisfied that the defendants have taken reasonable steps to provide a reasonably safe system of work.

It is also argued that the defendants were not negligent, as in this case, the method of loading was left to the employee. In *General Cleaning Contractors Limited* v. *Christmas, supra,* where a window cleaning company having contracted to clean, it was held at p. 180 that —

"... though there was no evidence of facts sufficient to establish negligence on the part of the employers in failing either to fix hooks for the safety belts into the building, or to cause the work to be done by means of ladders, they had negligently failed in their obligation to devise a reasonably safe system of work providing for an obvious danger, since they neither gave instructions to ensure that the windows should be tested before cleaning nor provided any apparatus, such as wedges, to prevent the windows from becoming closed. In leaving it to the initiative of the individual workmen to take precautions against a common danger, the employers failed to discharge their duty."

Moreover it is, I think, absolutely necessary for a reasonable and prudent employer to devise an up-to-date system of work in the light of prevailing circumstances. In *Graham* v. *Co-operative Wholesale Society, Limited,*[9] Lord Devlin said —

"An employer must take reasonable steps to keep his knowledge on the matter up to date. I do not think that this includes, except perhaps in exceptional cases, making independent researches of his own, but he must not allow himself to fall behind the standard which is adopted by reasonably good employers in the industry. I take the test which, I think, ought to be applied from the well-known passage in the judgment of Lord Dunedin, Lord President, nearly fifty years ago in *Morton* v. *William Dixon, Ltd.*[10] This test has been adopted many times since then, and was referred to recently in *Morris* v. *West Hartlepool Steam Navigation Co., Ltd.*[4] The words which Lord Dunedin used were these: 'Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either — to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or — to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it.' "

The defendants also argued that the plaintiff and PW 3 had been using this system for two years, and, if dangerous, the plaintiff himself was to blame, having contributed to the negligence. Mr. Majoribanks cited *Walker* v. *Bowaters Mersey Paper Mills, Ltd.*[11] and *Stapley* v. *Gypsum Mines Ltd.*[12].

Walker's case was a case of discharging of baled cargo stored in ship's hold. A bale fell from the top tier and injured the plaintiff. The plaintiff's claim was for breach of statutory duty under regulation 41 of Dock Regulations, 1934, and for breach of common law duty in that they allowed the plaintiff to work in the hatch when bales were insecurely stacked and likely to fall and that they failed to give warning of the dangerous trap which they knew or ought to have known. It was held that: —

"It had not been proved that the unstacking could not be safely carried out and that therefore regulation 41 did not apply; that it had not been established that there was any need for a warning to be given to experienced men; that supervision was unnecessary."

This case is different and the facts leading to the decision in that case can be distinguished from the facts in the present case. As Lord Goddard C. J. said on appeal —

"It was purely a question of fact as to whether the employers had neglected any duty which they owed to the employees."

In *Stapley's* case, there again the facts are not similar to the facts of the present case. It cannot, to my mind, be suggested from the mere fact that the plaintiff did not use cross pieces on this occasion though there is evidence that he did on certain occasions, that he himself acted negligently. The case, I think, has to be viewed as a whole, taking into account all the relevant considerations and in the light of the employer's common law duty. It was also suggested that the type of work that the plaintiff did, did not require any system. Mr. Majoribanks cited the case of *Kelly* v. *Manchester Ship Canal Company.*[13] This was a case of a safe system of work properly carried out. It is clear from the judgment of Lord Justice Sellers at p. 258 that the work done was in accordance with the usual practice. That, however, is not so in the present case. At p. 259, Lord Justice Sellers said in the course of his judgment —

"This was an unfortunate accident happening just in the course of reconstructing something which had collapsed. It was not anything to do with the ordinary method of working; it was incidental to it; and the men followed the same sort of procedure."

He also cited the case of *Martin* v. *A. B. Dalzell & Co., Ltd.*[14]. This was a case of the workman lowering equipment down the chute. In that case, again the system adopted was a system which the evidence showed had been adopted by the defendants' employees and had been used without mishap for ten years and there was also evidence, which was not contradicted, that a similar method was used by other firms.

For reasons which I stated earlier, there is evidence on the balance of probabilities, that the work was one where dangers were necessarily inherent in its operation, and that therefore, there was a duty on the part of the defendants, to provide a reasonably safe system so as to protect the workmen from unnecessary risk, and to give adequate instructions. In *Winter* v. *Cardiff Rural District Council, supra,* on the question of extent of master's duty and on the need to give instructions, it was held that —

"One of these obligations is to provide a safe system of working... The duty to provide a safe system of working is not absolute, but only to do his best to fulfil the obligation imposed on him, though, indeed, a high standard is exacted. That duty must be considered in relation to the circumstances of each particular case, and the question to be answered is whether adequate provision was made for the carrying out of

the job in hand under the general system of work adopted by the employer or under some special system adapted to meet the particular circumstances of the case. It is always a question whether the negligence complained of is the failure of the employer to inaugurate and maintain a safe system or the casual departure from that system as a result of the negligence of an individual fellow workman. The difference is between a case where sufficient and adequate provisions have been made, which will, if carried out, protect the workman unless one of his fellows does not use proper care in carrying out the system, and a case where the system itself makes no such provision. The duty of the employer is to act reasonably in all circumstances. One of these circumstances is that he is an employer of labour, and it is, therefore, reasonable that he should employ competent servants, should supply them with adequate plant, and should give adequate directions as to the system of work or mode of operation, but this does not mean that the employer must decide on every detail of the system or mode of operation."

The obligation of the employer has been recognized as three-fold in character —

"It is an obligation, and a continuing one, for the provision of a competent staff of men, adequate material, a proper system and effective supervision." [25 *Halsbury's* third edition, p. 510; see also *Tan Choon Seng* v. *Yang Kam Hah*[15] — the decision of Ali J. (as he then was) which was confirmed on appeal].

In the present case, I am satisfied that the defendants neglected to provide a reasonably safe system of work and failed to take reasonable steps to give adequate directions.

In my judgment, the plaintiff's claim must therefore succeed.

As regards damages, Mr. Murphy, counsel for the plaintiff informed the court that the plaintiff is waiving the special damages except the claim for loss of earnings from the date of the accident. Both counsel agreed that plaintiff was earning $300 per month at the date of the accident and loss of earnings for a period of approximately 5 years and 5 months amount to $19,500. Mr. Murphy asked that interest at 3% per annum be awarded in respect of this sum. Considering that this money has been held from the plaintiff, I feel that it is only proper that interest at 3% per annum be awarded.

As regards general damages, evidence shows that the plaintiff, 28 years old at the date of the accident, sustained fracture of the first and second lumbar vertibrae. He was paralysed below the waist and unable to walk. He is also unable to pass water and has no voluntary control of urine and cannot voluntarily vacate the bowel. He is impotent and requires someone to take care of him for the rest of his life.

Mr. Murphy drew my attention to a number of cases, mostly Singapore cases, where general damages for loss of amenities ranging from $50,000 to $70,000 were awarded. There was, however, one local case where Ismail Khan, J. (as he then was) awarded $70,000 for loss of amenities to a 20 year old male who suffered from paralysis of the muscles of the forearms and hands, the trunk and lower limbs [*Hamid bin Awang* v. *Yeo Kim Kuan*[16]]. The plaintiff in the present case, is paralysed from below the waist. In the light of the previous awards, I consider it reasonable that a sum of $60,000 be awarded for loss of amenities. As to future loss of earnings, I assess on the basis of $300 per month for 16 years, amounting to $39,000. On the question of interest on general damages, I do not consider it appropriate to award interest in this case.

I enter judgment for the plaintiff for a sum of $19,500 special damages with interest at 3% per annum, general damages $60,000 for loss of amenities and $39,000 for loss of future earnings and costs.

From the above judgment the defendants appealed to the Federal Court.

Azmi L.P.: Counsel for the appellant having abandoned his first ground of appeal against the quantum of special damages proceeded to argue the only other ground, which reads as follows: —

"(2) There was no finding of contributory negligence on the part of the plaintiff."

It is necessary to state the relevant facts. It would appear that the plaintiff (P.W. 4) who was a driver of the defendants' lorry and his co-worker P.W. 3, were loading 12" wide planks on to the trailer of a lorry. These two workers stood on the trailer to receive the planks from other labourers standing on the ground. The planks were passed from one side of the trailer and were then stacked on the other side in two rows until they came to a height of about 3 feet. They then stacked another two rows of planks to a height of about one foot and using this as a platform they completed the stacking of the earlier piles to a height of about 6 feet. The process would be repeated until the trailer was stacked with planks to a height of 6 feet. Before, however, the stacking of the timber was completed the first pile which had been stacked up to a height of 6 feet toppled and fell on the plaintiff and knocked him to the ground.

It was pointed out to us by counsel for the appellant that the plaintiff himself was aware of the purpose of using cross bars and of the consequential danger of not using them and he was therefore also negligent. Though evidence was given on behalf of the defendant by other lorry drivers that they have always used cross bars in the loading of planks, irrespective of the width of such planks, the plaintiff himself however said he used cross bars only when he was loading narrower planks.

On the question of the alleged contributory negligence of the plaintiff the learned judge, though he considered the question, did not appear to think that in this case it was relevant because he decided the case on the basis that this type of work was one where dangers were necessarily inherent in its operation and that there was a duty on the part of the defendants to provide not only a reasonably safe system so as to prevent the workmen from unnecessary risks, but that there was a duty on the employer to give adequate instructions and to provide reasonable supervision. It was apparent to me that there were no such necessary instructions given to the workers that they must use cross bars but they were left to their own devices and that their knowledge of the necessity of using cross bars was obtained by their own initiative in watching other workers.

In my view the learned judge was right and I would therefore dismiss this appeal with costs.

Gill F.J.: I am also of the opinion that this appeal should be dismissed.

The evidence on behalf of the defendants by other lorry drivers that they always used cross-bars in the loading of planks cannot be regarded as a complete answer to the charge that the defendants themselves had omitted to take precautions which were obviously called for, namely, to provide a safe system of work by giving specific instructions to their lorry drivers and attendants as to how the loading of the planks was to be done and making periodical checks to see that those instructions were obeyed.

As regards this aspect of the proof of negligence, Lord Normand in *Barkway* v. *South Wales Transport*[17] cited with approval the following passage from the judgment of Lord Dunedin (Lord President) in *Morton* v. *William Dixon, Ltd.*[10]:

"Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds — either to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it."

The evidence of those other lorry drivers, far from helping the defendants, tended to show that they omitted to take precautions which were commonly taken by other employers and that such precautions were so obviously wanted that it was a folly on their part to have omitted taking them.

Ali F.J.: I agree with the Lord President that this appeal be dismissed.

I only wish to add a few words of mine. The only point for decision was whether there should be a finding of contributory negligence against the plaintiff. The plaintiff's case on the pleadings was mainly that the appellant/employer had failed to provide a safe system of work. The defence answer to this was pleaded in the alternative. The contention being, that there was no obligation to provide a safe system of work or alternatively, "if there was such an obligation, the appellant has taken all reasonable steps to provide a system that was reasonably safe having regard to the dangers necessarily inherent in the work." The learned trial judge has rejected the main defence by holding that there was an obligation to provide a safe system of work which, on principle, is inseparable from the obligation to provide effective supervision. That principle is stated in *Halsbury's* Laws of England, 3rd edition, Vol. 25, on page 510 as follows:

"The master's duty to take reasonable care so to carry on his operations as not to subject his servants to unnecessary risk is a single duty, applicable in all circumstances. For convenience in applying the principle in particular cases, however, the master's obligation has long been recognised as threefold in character; it is an obligation, and a continuing one, for the provision of a competent staff of men, adequate material, a proper system and effective supervision."

The last of the three seems to have been applied to this case. On this the following passage which appears on page 513 in *Halsbury* seems relevant:

"Where, therefore, there is an obvious risk of injury unless a preventive safety device is used by the servant, the master's duty extends not only to providing the device but also to taking reasonable measures to see that his workmen use it.... The master cannot by delegating the performance of these duties to someone else escape liability if they are not properly performed."

In this case there was evidence by the defence that it was the practice to use cross pieces in loading so as to prevent planks stacked up to a certain height from falling. There was, however, no evidence to show that the appellant/employer has by adequate direction or supervision insisted upon the use of such cross pieces. In point of fact, and this seems clear from the plaintiff's evidence, the workmen were left entirely to their own devices as to the manner in which the planks were to be loaded. On the evidence before him the learned trial judge said:

"On the balance of probabilities, it is reasonable to conclude that the common practice was to leave entirely to the workmen to exercise their own discretion whether in any particular loading cross pieces ought to be used."

That was a clear finding of fact that the appellant had failed to provide an effective supervision as would enable the workmen to know of the danger or risk involved if cross pieces were not used. If the plaintiff in this case had no knowledge of the inherent danger or risk involved in not using cross pieces it is impossible to cast on him a duty to take care. According to his own evidence, he had not, previous to the accident, found it necessary to use cross pieces and this clearly suggests that he was not aware of the risk. If he was and had ignored it, there might be ground for saying that he was guilty of contributory negligence. There was no evidence to support that ground.

Appeal dismissed

Solicitors: *Lovelace & Hastings; Murphy & Dunbar.*